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ALEXANDER L. STEVAS,
CLERK

Case No. 84-1764

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CAFC No. 84-641

HUDBCA No. 79-421-C40

PAULINE WALBER, etc.

Appellant,

V.

THE UNITED STATES
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
SAMUEL PIERCE, Secretary,

Appellee.

APPENDIX FOR APPELLANT

By: Pauline Walber D/B/A
Walber Construction Co.
Appellant,
3530 West Outer Drive
Detroit, Michigan 48221
Phone: 313-864-6076 or
313-537-7800

Date: February 9, 1985

51pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

APPENDIX FOR APPELLANT

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Decision entered in the UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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Decision entered by the DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT BOARD OF CONTRACT APPEALS

Appeal of WALBER CONSTRUCTION CO.

HUDBCA No. 79-421-C40 (Asbury Park) Contract No. 044-78-4548

Decided July 1, 1983

Appendix C (1-11)

Issues of Fact Misrepresented by HUDBCA with its Decision

Prepared and Submitted by: Pauline Walber D/B/A Walber Construction Co., Appellant

Appendix D

JUDGMENT entered in the UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Walber Construction Co., Appellant V. the United States, Appellee

Appeal No. 84-641 -- 79-421-C40

Dated: June 13, 1984

Issued as a Mandate: July 31, 1984

Appendix E

ORDER Denying Appellant's Motion to vacate the Mandate, entered in the UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Walber Construction Co., Appellant V. The United States, Appellee

Appeal No. 84-641

Dated: October 4, 1984

Appendix F

Letter from George E. Hutchinson, Clerk for the United States Court of Appeals for the Federal Circuit, informing that the Court Denied Appellant's Motion "for leave to file out of time a motion for reconsideration of the decision and opinion dated June 13, 1984 and the motion to vacate the mandate issued July 31, 1984.

Dated October 4, 1984

Appendix G

NOTICE OF APPEAL, filed in the UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Stamped Received: December 24, 1984

Appendix H

Copy of Cover from original JURISDICTIONAL STATEMENT

Stamped Received in the Office of the Clerk, Supreme Court, U. S. January 3, 1985

JURISDICTIONAL STATEMENT was returned by the Supreme Court.

Appendix I

Letter from the Supreme Court, giving reason for returning the JURISDICTIONAL STATEMENT

Dated January 4, 1985

Received: January 18, 1985

Letter was addressed to 3520 W. Outer Drive, the correct No. is 3530 W. Outer Drive

Signed: by Edward C. Schade, Assistant Clerk

Appendix J

Letter from the Supreme Court, giving reason for again returning Jurisdictional Statement, that was resubmitted to the Court

Dated:February 26, 1985

Received: February 28, 1985

Signed by Edward C. Schade, Assistant Clerk

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

WALBER CONSTRUCTION COMPANY, Appellant,	)	
V.	)	APPEAL NO. 84-641
THE UNITED STATES, Appellee.	)	

DECIDED: June 13, 1984

Before FRIEDMAN and DAVIS, Circuit Judges, and SKELTON, Senior Circuit Judge

DECISION

The decision of the Department of Housing and Urban Development Board of Contract Appeals (the Board) denying appellant's claims against the government in connection with the termination for convenience by a contracting officer of a contract for repair of HUD-owned property is supported by substantial evidence and is affirmed.

OPINION

On April 6, 1978, contract no. 044-78-4548 was awarded by HUD to appellant Pauline Walber,

(Walber), owner and operator of Walber Construction Company, an unincorporated company, for repairs to HUD-owned property known as Asbury Park. Walber never did any work on the contract nor expended any funds with reference to it. On September 7, 1978, the contracting officer terminated the contract for the convenience of the government pursuant to paragraph 18 of the General Provisions of the contract, and directed Walber to provide HUD with a claim for any expenses incurred in connection with the contract to that date.

Walber submitted a claim for $3,583.20 for items that included damages for being "tied up" on the contract, interest on borrowed funds, cost of bonds and permits, and contractor's time. However, she was unable to substantiate or document the items of interest and costs, and the claims of damages and contractor's time not being recoverable under the Federal Procurement Regulations (she was not on a salary, but was paid out of profits), the contracting officer denied the claim in its entirety on September 25, 1979. Walber appealed the decesion of the contracting officer to the Board under the provisions of the Contract Disputes Act of 1978.

The Board held a hearing under proceedings applicable to the Act. At the hearing Walber contended that the termination of the contract was not for the convenience of the government but was made in bad faith to injure her. The Board found that the contracting officer did not act in bad faith when he terminated the contract and that, in fact, he could have terminated it for default because Walber had done no work nor expended any funds whatever on the contract. Such a default termination would have been detrimental to Walber with regard to her relationship with her surety (she had other contracts in progress). Therefore, the convenience termination was favorable to Walber.

Walber now contends before this court that the contracting officer breached the contract when he terminated it for the convenience of the government and that by doing so he discriminated against her by reason of her sex. We find no mention of a claim for a breach of contract in the opinion of the Board. However, since Walber is acting pro se, we liberally construe her allegations of bad faith as equivalent to claims of breach of contract. But this is of no help to her because the Board found that there

was no bad faith in the termination of the contract. This finding is supported by substantial evidence and is binding on us.

There is no indication in the Board's opinion that Walber claimed before the Board that she had been discriminated against by a bad faith contract termination because of her sex. It is well settled that an issue not presented to the Board cannot be considered by this court on appeal. But in any event, even if the issue was presented before the Board it was without merit, because the Board found there was no bad faith, and, consequeantly, no breach by the contract termination. Such finding eliminated all bad faith breach claims, including those of sex discrimination if they were before the Board.

It is well settled that a contracting officer has the unfettered right in his discretion to terminate a contract for the convenience of the government, and his decision is conclusive, if he acts in good faith. See Federal Procurement Regulation 1-8.703(a). It is presumed that an officer of the government acts conscientiously and in good faith in discharging his duties. In this case,

Walber had the burden of overcoming this presumption, which she wholly failed to do.

The Board correctly approved the termination for convenience of the contract by the contracting officer, and also his rejection of all of the money claims of Walber, for the reasons stated above.

Walber asks us in this appeal to transfer the case to a district court because of her sex discrimination claim and so that she might have a "trial de novo.". This we decline to do. In the first place, it would not be in the interest of justice to transfer the case, as required by 28 U.S.C. 1631, as Walber's sex discrimination claims would probably be barred by collateral estoppel in any future district court action because of the Board's finding of no bad faith. Furthermore, Walber has not shown that her sex discrimination claim has any merit or substance on which relief could be granted.

The findings of the Board are supported by substantial evidence, and its decision is correct as a matter of law and is affirmed.

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
BOARD OF CONTRACT APPEALS
WASHINGTON, D. C.

Appeal of:	HUDBCA NO. 79-421-C40
WALBER CONSTRUCTION CO.	(Asbury Park)
(Contract No. 044-78-4548)	

Ms. Pauline Walber, d/b/a
Walber Construction Company
3530 West Outer Drive
Detroit, Michigan 48221
For the Appellant, pro se

Joan J. Saloschin, Esquire
Office of General Counsel
U.S. Department of Housing
and Urban Development
Washington, D. C. 20410
For the Government

DECISION

Statement of the Case

This is an appeal concerning the termination for the convenience of the Government of Contract No. 044-78-4578 on September 7, 1978, and the disallowance of the termination settlement claim filed by Walber Construction Company, Appellant herein, after termination of the contract.

Appellant wrote a letter dated June 29, 1979 to the Secretary of the Department of Housing and Urban Development ("HUD") contesting the appropria-

teness of the contract termination. Appellant's letter of June 29, 1979 was forwarded to the Board of Contract Appeals, which treated the letter as a notice of appeal and docketed it accordingly. Subsequent to the docketing of the appeal, the Contracting Officer issued a final decision on Appellant's termination settlement claim, denying it in its entirety. Inasmuch as Appellant had attached a copy of the termination settlement claim which had been submitted to the Contracting Officer to the notice of appeal addressed to the Secretary, the Board treated the appeal as encompassing all items on the settlement claim subsequently denied by the Contracting Officer in a final written decision dated September 25, 1979.

Appellant's settlement claim for $3,583.20 was for damages of 20 percent of the total price of the contract for "being tied up" with the contract and for interest on borrowed funds reserved for contract performance, costs for bonds and permits and "Contractor's time involved with Contract." The Board treated Appellant's appeal as an election to proceed under the Contract Disputes Act of 1978 because of the nature of the relief sought by

Appellant and the fact that the claim was not filed with the Contracting Officer until after the effective date of the Act.

Both before and after the hearing, the Government moved for partial summary judgment on the issue of damages, which Appellant had recharacterized before the Board as a breach of contract claim. The motion was denied on the ground that there were material facts in dispute. At the hearing, Appellant attempted to amend its claim to add specific cost items that had not been presented to the Contracting Officer at any time. The request to amend was denied but a proffer was permitted.

We deny the appeal of Walber Construction Company in its entirety for the reasons set forth in this Decision.

Findings of Fact

1. On January 10, 1978, HUD issued an Invitation for Bid on a contract for repair of a HUD-owned property located at 15854 Asbury Park, Detroit, Michigan. Bid opening was January 24, 1978. On February 28, 1978, Appellant was notified that it was the successful bidder of the contract. Although Appellant had not submitted the lowest bid, it was

determined by HUD that the lowest bidder had made a mistake in bid and after that determination, Appellant's bid of $11,471 was accepted as the lowest responsible bid. (AF, Tabs 2 and 3E; Tr. 363-64,406.)

2. On April 6, 1978, Contract No. 044-78-4548 was awarded to Appellant for the repair of the Asbury Park property.

3. Appellant is wholly owned and solely operated by Pauline Walber ("Walber"). Walber is compensated for her time solely out of profits earned by Appellant. (Tr. 68, 283.)

4. In accordance with the policy of the HUD Detroit Area Office Contracting Section, Walber prepared a proposed amendment for additional work not included in the contract that she believed would be necessary to make the property safe and habitable. Walber's proposed amendment included forty-two (42) separate items to be added to the contract, which she valued at $2,070.00. (AF, Tab 3G.; Tr. 171, 366.)

5. After Walber presented the proposed amendment to HUD, a HUD Inspector, Ralph Miller, conducted a walk-through inspection of the property with Walber on April 12, 1978, to determine whether the

proposed amendment items were necessary (Tr. 367, 369).

6. At the end of the walk-through inspection, Miller gave Walber a written notice to proceed (AF, Tab 3F)

7. The completion date of the contract was July 11, 1978, as determined from the date of the notice to proceed (Tr. 367-68).

8. At the walk-through inspection, Miller had provisionally approved a number of the items listed on Walber's proposed amendment. Walber's estimated prices for the additional work items deemed by Miller to be necessary were referred to John Janetta, a HUD construction analyst, for cost evaluation. (Tr. 370, 394.)

9. Janetta, in performing the cost evaluation on Walber's proposed amendment, reduced a number of the prices Walber had requested and also disallowed some of the items Miller had provisionally approved at the walk-through inspection. Janetta had authority to deny items provisionally approved by Miller. (AF, Tab 3G; Tr. 397-401.)

10. HUD prepared a typed amendment form, listing the additional work and prices for that work

approved by Janetta, which was signed by Janetta and Don Snyder, the Contracting Officer, but not by Walber (AF, Tab 3G).

11. Walber and Janetta were unable to agree on the prices for the approved amendment items. Walber believed that Janetta was deliberately attempting to set prices below those approved for other contractors for similar work on other contracts. She met with the Contracting Officer, Don Snyder, who tried to "smooth over" the rocky relationship between Walber and Janetta, but Snyder did not actually evaluate or study the prices in dispute. (Tr. 174, 179, 210, 376.)

12. Snyder had asked Janetta about Walber's accusations that he was deliberately setting prices low. Snyder felt assured from talking with Janetta that the prices he had approved for Walber were comparable to prices that he was setting for similar work on other contracts, and that those prices were within the range of the price guidelines for specific contract repair items prepared by Brothers Specifications for HUD. (Tr. 418-420.) We find no evidence that Janetta was deliberately setting prices for amendment items unreasonably low to the

detriment of Appellant.

13. Despite the fact that the notice to proceed had been given on April 12, 1978, Appellant never performed any work on the contract (Stipulation of the parties).

14. Walber testified that work was not started on the contract because "someone" had told her not to start work until the problem with the prices on the proposed amendment had been resolved. Walber did not remember who that person was but assumed that it must have been Janetta or Snyder. Snyder testified that no such direction had ever been given to Walber by him, or to his knowledge, by Janetta. She received no written notice to stop or delay work on the contract. (Tr. 298, 300, 330, 339-80.)

15. Based on a preponderance of the evidence, we find that Walber was not told to delay starting work on the contract by Snyder, and Snyder did not have knowledge of or ratify any such statements that may have been made by Janetta to that effect.

16. Snyder was being pressured by the HUD Disposition Section to have the contract completed. HUD had entered into a contract for sale of the

Asbury Park property, and it was because of that contract for sale that the repair contract had been advertised. Snyder told Walber of the pressure he was under to get the repairs completed. (Tr. 363, 374, 378.)

17. During the period after April, 1978, Snyder was in transition to another job in HUD and Therese Dziekan was the acting Contracting Officer. However, Snyder continued to meet with Walber to listen to her complaints and to communicate to her the need to complete the contract repairs so that the sale of the Asbury Park property could be closed. (Tr. 416-17.)

18. By letter dated September 7, 1978, Contracting Officer Therese Dziekan terminated the contract for the convenience of the Government pursuant to Paragraph 18 of the General Provisions of the Contract. The Contracting Officer's Notice of Termination directed Appellant to provide to HUD a claim for any expenses incurred in performance of the contract to that date. (AF, Tab 2.)

19. Although the Notice of Termination did not state the reasons why the termination was for the convenience of the Government, Don Snyder, who

was consulted on the decision to terminate, testified that the main reason for the termination was Appellant's failure to start work on the contract. Appellant's unwillingness to negotiate on the prices for the amendment work was also a factor in the decision, though it was secondary to the need for contract performance. Snyder further testified that the Department could have terminated the Contract for default, but he recommended that the less onerous termination for the convenience of the Government be used so as not to damage Appellant's relationship with its surety. (Tr. 382-385.)

20. Paragraph 18 of the General Provisions of the contract (SF 23-A) provides that the clause in Section 1-8.703 of the Federal Procurement Regulations (FPR) is incorporated by reference into the contract as if fully set forth. Section 1-8.703 of the FPR entitled "Termination clause for fixed-price construction contracts," provides in pertinent part as follows:

1-8.703 - TERMINATION FOR CONVENIENCE OF THE GOVERNMENT

(a) The performance of work under this contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever the Contracting Officer shall

determine that such termination is in the best interest of the Government...

(c) After receipt of a Notice of Termination, the contractor shall submit to the Contracting Officer his termination claim, in the form and with the certification prescribed by the Contracting Officer. Such claim shall be submitted promptly but in no event later than one year from the effective date of termination.....

(d) Subject to the provisions of paragraph (c), and subject to any review required by the Contracting agency's procedures in effect as of the date of execution of this contract, the Contractor and the Contracting Officer may agree upon the whole or any part of the amount or amounts to be paid to the contractor by reason of the total or partial termination of work pursuant to this clause, which amount or amounts may include a reasonable allowance for profit on work done....

(e) In the event of the failure of the Contractor and the Contracting Officer to agree as provided in paragraph (d) upon the whole amount to be paid to the Contractor by reason of the termination of work pursuant to this clause, the Contracting Officer shall..determine, on the basis of information available to him, the amount, if any, due to the Contractor by reason of the termination and shall pay to the Contractor the amounts determined as follows:

(1) Wth respect to all contract work performed prior to the effective date of the Notice of Termination, the total (without duplication of any items) of --

(i) The cost of such work;
(ii) The cost of settling and paying claims arising out of the termination of work under subcontracts or orders,

(iii) A sum, as profit on (i), above, determined by the contracting officer pursuant to 1-8.303 of the Federal Procurement Regulations ... Provided, however, that if it appears that the

contractor would have sustained a loss on the entire contract had it been completed, no profit shall be included or allowed under this subdivision (iii)..

(f) Cost claimed, agreed to, or determined pursuant to paragraphs (c), (d), and (e) of this clause shall be in accordance with the contract cost principles and procedures in Part 1-15 of the Federal Procurement Regulations (41 CFR 1-15) in effect on the date of this contract.

(k) Unless otherwise provided for in this contract, or by applicable statute, the Contractor, from the effective date of Termination and for a period of three years after final settlement under this contract, shall preserve and make available to the Government at all reasonable times at the office of the Contractor ... all his books, records, documents, and other evidence bearing on the costs and expenses of the Contractor under this contract and relating to the work terminated hereunder.....

21. On July 3, 1979, Pauline Walber personally delivered Appellant's termination claim in the form of a blanket invoice and "Explanation of Invoice" to Irving Beaupied, then acting Contracting Officer. The claim was dated June 29, 1979. (AF, Tab 6.)

22. The invoice submitted as a termination claim was for $3,583.20. The attached Explanation of Invoice briefly recited Appellant's version of the history of the contract from bid opening to the termination for convenience and itemized the termination claim as follows:

Damages for being tied up to (sic) Contract from 2-28-78 to 9-7-78 plus Interest on borrowed funds, reserved for cost to Rehabilitate property,

from 4-12-78 to 9-7-78--20% of Contract	$2,294.20
Cost for Bonds & Permits	289.00
Contractor's time involved with Contract	1,000.00
Total amount due	$ 3,583.20

Will accept property "As Is" in lieu of money. (AF Tab 6.)

23. Beaupied asked George Day, Special Assistant to the Director of the HUD Detroit Area Office, who had served as an Acting Contracting Officer for five months in 1979, to evaluate Appellant's termination claim. Day decided that an audit was necessary because of the lack of substantiation provided by Walber in support of the claim. On August 9, 1979, an audit was requested. The audit report, dated September 7, 1979, indicated that the auditors were unable to gain sufficient access to Walber's files to gather information relevant to the termination claim. (AF, Tab 8; Tr. 435-37, 438, 442.)

24. By letter dated August 6, 1979, HUD requested substantiation of Appellant's claim for the bonds and permits. (AF, Tab 1.) George Day called Walber to ask her to bring in cancelled checks to

help support the claim. Walber did bring in can-cancelled checks, as Day had requested, but they contained no reference to the bond and permits which Appellant claimed were purchased for repair of Asbury Park. (Tr. 439, 443-44.)

25. On August 15, 1979, a settlement conference on the termination claim was held by Beaupied and Day with Walber. The conference was terminated in less than an hour because Walber insisted that she absolutely had to have money for "damages" and for her personal time, and the Government representatives insisted that the Federal Procurement Regulations did not permit payment for either damages or a contractor's time on termination claims. (Tr. 443.)

26. By letter dated September 5, 1979, Beaupied notified Walber that the City of Detroit had no record of a permit issued to Walber for the Asbury Park property, and that the permit number written on the checks Walber had submitted to substantiate the claim did not refer to Asbury Park. The letter also advised Walber that the authorized bonding fee was $109.00. (AF, Tab 10.)

27. By letter dated September 10, 1979, [illegible] APPENDIX B-13

Beaupied notified Walber that the bonding company and agents for the bonding company had advised HUD that Walber had incurred no cost for the bond. Therefore, HUD would not approve payment of $109.00 for bond listed on the termination claim. (AF, Tab 11.)

28. Charles Platt, Inc., the bonding company, had billed Walber for $109.00 in July 1978 for the performance bond for Asbury Park. In March, 1979 prior to Appellant's filing of its termination claim, the bonding company issued a credit memo to Walber for $109 on the bond, resulting in no bond cost to Appellant. (Gov't. Exh. 1.)

29. By final decision dated September 25, 1979, Beaupied denied Appellant's termination claim in its entirety, citing the lack of substantiating documentation for denial of the claim for bonds and permits and the Federal Procurement Regulations for denial of the claim for damages and Walber's personal time. (AF, Tab 1-A.)

30. The contract was readvertised by HUD, and on June 21, 1979 was awarded to William Murray for $12,770.00 (Stipulation of the parties).

Discussion

I. The Termination for Convenience

Appellant contends that the termination for convenience was made in bad faith and was not beneficial to the Government. Appellant's argument in support of the charge rests on two separate theories. First, Appellant contends that the Government negotiated in bad faith on Appellant's price requests for the items proposed by Appellant in its first amendment request and that Appellant's refusal to accept what it characterized as unfair price offers was an excuse for terminating the contract. Second, Appellant argues that because the Government did not make as large a profit on the sale of the Asbury Park property after reprocurement of the rehabilitation work as it could have if Appellant had been allowed to complete the contract, the termination and subsequent reprocurement of contract services was not beneficial to the Government or "for its convenience."

Termination of a contract for the convenience of the Government is an action to be taken within the discretion of the Contracting Officer. That discretion has been interpreted as broadly as possible to allow the Government the greatest

flexibility in adapting to changing needs for services, fluctuating market conditions, availability of funds, and other factors that it deems require a change in a particular procurement. It does not impute fault to the contractor. Colonial Metals Company v. United States, 204 Ct. Cl. 320, 494 F. 2d 1355 (1974); Nolan Bros., Inc. v. United States 186 Ct. Cl. 602, 405 F. 2d 1250 (1969). In the absence of bad faith or abuse of discretion, the Contracting Officer's election to terminate for convenience is conclusive. John Reiner & CO. v. United States, 163 Ct. Cl. 381, 325 F. 2d 438 (1963), cert. denied, 377 U.S. 931 (1964). Because the Government has an inherent right to terminate contracts for its convenience, the burden of proving that the termination was not taken for the convenience of the Government, but was carried out in bad faith for reasons not related to the Government's best interests, is the contractor's burden. Librach v. United States, 147 Ct. Cl. 605 (1959).

Bad faith is an onerous charge that requires "well-nigh irrefragible proof" to overcome the presumption that public officials act conscientiously and in good faith in discharging their duties.

Knotts v. United States, 128 Ct. Cl. 489, 492, 121 F. Supp. 630, 631 (1954). Specific intent to injure the contractor must be proved to establish bad faith. Kalvar Corporation v. United States, 211 Ct. Cl. 192, 543 F. 2d 1298 (1976). Simply because Appellant does not like what Government officials have done does not mean that they acted in bad faith.

We find that in the instant case Appellant has failed in all respects to carry its burden of proof that the Contracting Officer acted in bad faith when she terminated the Asbury Park contract for the convenience of the Government. The record simply does not support a conclusion that any of the Government officials at HUD who dealt with Walber intended to injure her. Appellant did not present compelling evidence of unfair pricing of extra work items proposed by Appellant, nor do we in any way agree that haggling over prices on amendments is anything out of the ordinary in the life of a Government contractor. We find no animus against Appellant. In fact, it would appear that the Government made every effort to protect Appellant from the worst effects of a termination. We note that the former Contracting Officer recommended that the

termination of the contract be taken for the convenience of the Government rather than default to protect Appellant's bonding status. Given the facts in this case, a termination of Appellant's contract for default would have been justified. Appellant's utter failure to perform any work at all under the contract was outrageous and certainly merited no compassionate considerations of the burdens of a default termination. The Government had no obligation to Appellant to terminate this contract for convenience rather than for default.

Appellant has suggested a most unique test to determine what constitutes convenience of the Government; that being the ultimate profitability of a contract. First, we cannot agree with Appellant that the Government lost more than time in terminating and reprocuring the repair services. The Government had received nothing from Appellant from the award of the contract until its termination. By reprocuring the contract services, it was finally able to sell the property in good repair. In any event, we note that even if the Government had realized a smaller profit or even lost money on the ultimate disposition of the property, procurement

policy considerations are within the discretion of the Government's procurement officials. Many competing needs and policies are aften balanced in a way that may not appear at first blush to be beneficial, but have been deemed to be so by those officials responsible for such policies. Even a ill-advised or foolish procurement policy decision does not constitute bad faith. We find the charge of bad faith in relation to the instant contract termination so totally lacking in merit as to be frivolous. We deny that portion of Appellant's case challenging the propriety of the termination for convenience.

II. The Termination Claim

Appellant presented a bare-bones termination settlement claim to the Contracting Officer nine months after the termination. It was not supported by documentary evidence. Moreover, it lacked the minimal detail necessary to make any intelligent appraisal of how much money, if any, Appellant was entitled to recover. The Contracting Officer and his staff attempted to obtain from Appellant substantiating documents, work logs, or pay records that might have supported the claim. Appellant,

however; offered only the most grudging cooperation, apparently not understanding that the Government's attempt to gain more information was not meant as harrassment but as assistance. We find that Appellant is entitled to no payment for the items presented to the Contracting Officer in the termination claim for the reasons set forth below.

A. Damages for forebearance from other contract workand interrest on borrowed funds.

Appellant claimed that it was entitled to twenty-percent of the face value of the contract for interest on borrowed funds alleged to have been reserved for performance of the contract and for "being tied up to Contract from 2-28-78 to 9-7-78." Appellant presented no evidence of actual interest charges incurred on loans, or a loss of interest on committed funds that were specifically related and necessary to the performance of the instant contract or business expenses of Appellant. Moreover, interest on borrowing and the cost of financing is not an allowable cost, as a general matter. 41 C.F.R. 1-15.205-17. A contractor can only recover interest on loans as part of a termination for convenience claim if the loans were necessary for performance

of the specific contract and were obtained solely for that purpose. Q.V.S., Inc., ASBCA No. 7513, 1963 BCA 3699. Not only did Appellant fail to present evidence of borrowings or financing costs, but admitted that any borrowing or use of money by it was not separated and restricted for each contract. Therefore, we find that Appellant is not entitled to interest on any borrowed funds or the cost of money as a termination claim item.

Likewise, "being tied up" with a contract for a period of time is not a recoverable cost. Such a claim is a request for consequential damages which is not recoverable as a termination claim item. Damages and anticipatory profits are only recoverable for breach of contract. G.L. Christian & Associates v. United States, 160 Ct. Cl. 312 F. 2d 418, cert. denied, 375 U.S. 954 (1963). This contract was not breached by the Government. The purpose of a termination settlement claim is to compensate a contractor for the work done and the preparations made. 41 C.F.R. 1-8.301(a). Appellant did no work on the contract prior to termination and made only the most minor preparation for eventual

performance. We cannot see how Appellant was "tied up" with the contract for any period of time that would give rise to a claim for money. Because Appellant did not perform any of the contract work over the entire period of time, it certainly was free to carry on other business obligations unfettered by the demands of the instant contract which it felt no obligation to satisfy. We find the claim for damages to be frivolous and wholly without merit as a matter of law.

B. Cost for Bonds and Permits

Although the cost of performance bonds and permits are recoverable under a termination for convenience settlement, the contractor has the burden of establishing the fact that such costs were incurred and their amount. See Roberts International Corp., ASBCA No. 15118, 71-1 BCA 8869.

Appellant failed to carry its burden of proof that it incurred any costs for either performance bonds or permits on the instant contract. The Government's position that no such costs had been incurred was overwhelmingly supported by the evidence in the record. Appellant is entitled to no allowance for either bonds or permits on the termination

claim for the Asbury Park contract..

C. Contractor's time involved with Contract

Walber requested $1,000.00 for time she spent "involved with the contract." Walber is compensated solely out of profits and is paid no salary or other form of compensation. On a termination claim, a contractor is entitled only to the unreimbursed costs of performance plus a reasonable profit on those incurred costs. 41 C.F.R. 1-8.703(e). If a contractor incurs no costs, it cannot recover profit on those costs. Shin Enterprises, Inc., ASBCA No. 16542, 72-1 BCA 9391. Appellant incurred no costs for Walber's time because Walber was not compensated for the time she spent on the contract preparations. While compensation to sole proprietors may be a recoverable cost under certain limited circumstances, the compensation must be for actual personal services rendered rather than a distribution of profits. 41 C.F.R. 1-15.205-6(2)(i) and (3); 41 C.F.R. 1-15.403-7(c). In the absence of a specific provision in the contract, "constructive" compensation of an unsalaried proprietor is not allowed. Norman M. Giller & Associates v. United States, 210 Ct. Cl. 80, 535 F 2d 37 (1976).

At the hearing, Walber was permitted to make an offer of proof as to parking, gas and depreciation expenses incurred by her in driving back and forth to the HUD office and to the property, although such costs were never claimed by Walber prior to the hearing. We have no jurisdiction to consider claims not presented to the Contracting Officer and denied by him. 41 U.S.C. 607(d). However, Appellant may submit such additional termination claims to the Contracting Officer, who has the discretion to consider them in accordance with 41 C.F.R. 1-8.703(c). In any event, this Board would have no jurisdiction to consider such claims because they would, of necessity, be submitted to the Contracting Officer more than one year after the effective date of the termination for convenience. 41 C.F.R. 1-8.703(g).

CONCLUSION

The termination for convenience was not made in bad faith and shall not be disturbed. Appellant is not entitled to payment for any of the items listed on its termination claim. The appeal of Walber Construction Company is denied in its entirety.

HUD BOARD OF CONTRACT APPEALS

JEAN S. COOPER
Administrative Judge

Concur:

David T. Anderson
Administrative Judge

Administrative Judge Edward Terhune Miller was absent on official leave and did not participate in this decision.

Dated: This 1st day of July, 1983.

IN THE
SUPREME COURT OF THE UNITE STATES

WALBER CONSTRUCTION CO., Appellant,	Case No. _____
V.	
THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, Appellee.	CAFC No. 84-641
	HUDBCA No. 79-421-C40

APPENDIX FOR APPELLANT

ISSUES OF FACT MISREPRESENTED BY HUDBCA WITH ITS DECISION

APPX. B-4, Paragraph 4 states:

"In accordance with the policy of the HUD Detroit Area Office Contracting Section, Walber prepared a proposed amendment for additional work not included in the contract that she believed would be necessary to make the property safe and habitable. Walber's proposed amendment included forty-two separate items to be added to the contract, which she valued at $2,070.00 (AF Tab 3G.; Tr. 171, 366.)"

Tab 4, letter awarding Contract, clearly indicates that as a condition included with Award of Contract, Appellant was instructed to prepare the initial Amendment, prior to Walk-through (W/T). This is considered a start-up activity.

APPX. B-5, Paragraph 6, states:

"At the end of the walk-through inspection, Miller gave Walber a written notice to proceed (AF, Tab 3F)."

This Document indicates that property was "Inspected by: Ralph Miller, Date: 4-12-78". The date

that authorization to commence work was received by Appellant, remained open.

To avoid having the clock run towards completion date, was the reason for not entering the date received, (see CF A-Exh. "K"), in addition, T.168 HUDBCA 79-387-C19 (10-30-79) (Sawyer), Government's Witness, James Sullivan states:

"The amendments should normally be resolved prior to the time the construction starts".

These supports that Appellant was instructed not to commence work until further Decision by HUD.

APPX. B-5, Paragraph 9 states:

"Jannetta, in performing the cost evaluation on Walber's proposed amendment, reduced a number of the prices Walber had requested and also disallowed wome of the items Miller had provisionally approved at the walk-through inspection. Janetta had authority to deny items provisionally approved by Miller. (AF, Tab 3G; Tr. 397-401)"

This certainly confirms the poor relationship between Jannetta and Appellant. At the W/T, present with Miller were two (2) men from Brothers Inc., it did not justify for Jannetta who did not see the property to disallow Items that by the opinion of three (3) authorized men that saw the property, the Items that they approved.

Jannetta well knew that Appellant would be forced to perform this additional work, at no cost to

the Government, in order to obtain City Certification on total repairs. This was nothing new, coming from Jannetta, he adopted this action against Appellant, as a "steady diet", which supports that Appellant was a victim of Government abuse and Sex Discrimination. Jannetta did not burden the Male Contractor, with such abuse.

APPX B-4, Paragraph 12 states:

"Snyder had asked Janetta about Walber's accusations that he was deliberately setting prices low. Snyder felt assured from talking with Janetta that the prices he had approved for Walber were comparable to prices that he was setting for similar work on other contracts, and that those prices were within the range of the price guidelines for specific contract repair items prepared by Brothers Specifications for HUD. (Tr. 418-420.) We find no evidence that Janetta was deliberately setting prices for amendment items unreasonably low to the detriment of Appellant."

Don Snyder, as a C/O, fully aware of the poor relationship between Jannetta and Appellant, to insure that all Contractors on his Program shall be treated as equal, had a duty not to just ask Jannetta. Don Snyder's obligation was to check Amendment with the three (3) men present at W/T and with Cost Price List, for amounts allowed, to determine if Jannetta's action was justified.

Don Snyder conveniently failed to do so. (see Appendix B-4 Parg. 11.)

AF A-Exh. #5, Amendments approved for William Murray & Co., the Contractor that was later awarded this Contract, supports that Jannetta was abusive and Discriminating with the demands made upon Appellant, with regard to the initial Amendment, demanded by HUD, that Appellant prepare, Tr. 201-204.

AF A-Exh. #6 and A-Exh. #7, also support that Jannetta was deliberately setting prices on Amendments and denying Amendments for cost increase, to be abusive and financially cause damage to Appellant.

All these evidence and testimony, the Board conveniently and completely chose to ignore with its Decision.

APPX B-7, Paragraph 15 states:

"Based on a preponderance of the evidence. we find that Walber was not told to delay starting work on the contract by Snyder, and Snyder did not have knowledge of or ratify any such statements that may have been made by Janetta to that effect."

The Board is basing this purely on testimony given by Government Witnesses, not on documentation to support this issue, since the Government claims to have discarded this main evidence.

The W/T Specification book, was the main evidence essential for Appellant to prove that she was instructed not to commence work, pending a Decision by HUD.

(a) The Government controls all Documents essential to use as evidence.

(b) The HUDBCA without just cause allowed this Appeal to prolong for three (3) years.

(c) This granted the Covernment the opportunity to claim, for the first time, that the W/T Specification Books have been Destroyed.

(d) Now, HUDBCA rules that "based on a preponderance of evidence" which was all "hear-say by Government Witnesses, that Appellant failed to prove that she was instructed not to commence performance on Contract.

This most certainly is lacking Justice, since Government Witnesses, including Don Snyder, were just as untruthful on this issue, as they were untruthful with the manufacturing of two (2) types of Cost Price Lists, that never existed, to support Government's Defense. (Jurs. St. 11-14 and A-Exh. #1 and #2.)

APPX B-7, Paragraph 16 states:

"Snyder was being pressured by the HUD Disposition Section to have the contract completed. HUD had entered into a contract for sale of the Asbury Park property, and it was because of that contract for same that the repair contract had been advertised. Snyder told Walber of the pressure he was under to get the repairs completed. (Tr. 363, 374, 378.)"

This is totally misrepresented by the Board and Don Snyder:

Lela Cade the alleged Purchaser, did not purchase this property.

This property was to be used as a replacement of a defective property previously sold Lela Cade, known as the Coyle property. To be exact, this is the third defective property that Lela Cade got stuck with, by HUD, who supposedly is providing adequate Housing for the Low and Moderate income family.

This also supports that Lela Cade had two (2) Government acquired properties tied up; this property and the Coyle property she was living in, and, all these failed to move Don Snyder and other HUD Employees to take proper action:

(a) Appellant's Amendment request that caused disputes, is dated April 10, 1978 (Tab 3G 2).

(b) Contract was Terminated September 7, 1978. The Government waited almost five (5) months to settle this issue and then failed to inform Property Disposition that Contract was Terminated.

(c) Rapid Reply Letter from Disposition (Tab 17), (this Document Judge Cooper refused to allow as evidence and refused to accept to supplement Record File). dated May 24, 1979, more than one year from the date of Dispute over Appellant's Amendment Request, states:

> "Emergency - Please Send out Bids.
>
> Dispo wasn't aware of the cancellation of Contract #044-78-4548
>
> Note: Please repair ASAP - We have a buyer who has been waiting over a year"

(d) This can not be considered as pressure that

nyder was under to get repairs completed, that ould justify Termination of Appellant's Contract, o be in the best interest of the Government.

This clearly supports that Contract was Terminated in bad faith, based on Sex Discrimination.

For further information of Lela Cade's involvement with HUD and as an example as to how the U. S. Department of Housing and Urban Development provides Housing for the low and moderate income family, see CAFC file, Appendix #26, "Lela Cade the Purcasher" (8 Pages) and in support thereof, see Legal Documents in HUDBCA Appeal File, 79-421-C40.

APPX B-8, Paragraph 19, states:

"Although the Notice of Termination did not state the reasons why the termination was for the convenience of the Government, Don Snyder, who was consulted on the decision to terminate, testified that the main reason for the termination was Appellant's failure to start work on the contract. Appellant's unwillingness to negotiate on the prices for the amendment work was also a factor in the decision, though it was secondary to the need for contract performance. Snyder further testified that the Department could have terminated the Contract for default, but he recommended that the less onerous termination for the convenience of the Government be used so as to not damage Appellant's relationship with its surety. (Tr. 382-385.)"

This was completely misrepresented by Don Snyder and the Board, who was made aware of this.

Don Snyder is not in a position to Claim that he chose to Terminate Contract "for the convenience

of the Government","so as not to damage Appellant's relationship with its surety":

(a) Don Snyder was fully aware that a Surety Co. cannot intervene with Contract Disputes, (see CAFC A-Exh. "L").

(b) Due to the Dispute over the Amendment, there is no way that Don Snyder could have Terminated this Contract by Default..

(c) Don Snyder, September 28, 1978, twenty one (21) days after Contract was Terminated, without just cause and with the absence of any evidence on Record, to support same, recommended that Appellant be ruled as a non-responsible Contractor, (see CAFC A-Exh. "M").

(d) As a result of this recommendation, without due process of Law, Appellant was suspended from participating with HUD Programs.

(e) Under HUDBCA 80-472-D20, the Hon. B. Paul Cotter Jr., Administrative Judge, entered an ORDER, April 21, 1980, to reinstate Appellant, "with full right to participation in all programs of the Department of Housing and Urban Development."

As of this date, the Government remains in contempt of said ORDER.

All these well supports that upon instructions by Don Snyder, Contract was Terminated in bad faith, involving Discrimination.

In addition, the Government did not have a well drafted Termination for Convenience Clause, with this, nor any of the other twelve (12) Terminated Contracts. which constitutes a Breach of Contract, which Appellant Claims involved Sex Discrimination.

The lack of a well drafted Termination for Convenience Clause, can be well confirmed with the HUDBCA Rule 4 File.

APPX. B-12, Paragraph 23 states:

"Beaupied asked George Day, Special Assistant to the Director of HUD Detroit Area Office, who had served as an Acting Contracting Officer for five months in 1979, to evaluate Appellant's termination claim. Day decided that an audit was necessary because of the lack of substantiation provided by Walber in support of the claim. On August 9, 1979, an audit was requested. The audit report, dated September 7, 1979, indicated that the auditors were unable to gain sufficient access to Walber's files to gather information relevant to the termination claim. (AF, tab 8: Tr. 435-37, 438, 442)"

With this, the Board's Decision is obscuring the true facts and conveniently fails to indicate that on Page 1, under "SUMMARY", this Document, the Audit Report, states:

"The original contracts (Paragraph 23 of General Provisions) do not require the Contractor to give us access to records."

On Page 3, said Document states:

"The fact that construction began on three of the four contracts (including fairly substantial progress on 1605 Edison) supports the Contractor's contention that she devoted time to start-up activities." (Emphasis added).

Same page in Paragraph 5, states:

"The contracts were originally awarded on the fixed-price basis as opposed to the cost-reimbursement basis; for completed contracts, the contractor's actual costs would be irrelevant to HUD."

These are just a few of the facts misrepresented with the Board's Decision. Had the CAFC informed Appellant that it was going to construe her Appeal for the Right to a new Trial, that Appellant did not know she had, to be a Petition for Review of the Board's Decision, Appeal would have been presented accordingly.

It can well be noted that for the most, each time the Decision refers to the Transcript, it is to testimony by Government Witnesses, who were well protected, by the Board, against perjury, and/or contempt of Court, by failing to comply with ORDERS, issued by the Board.

It can also be noted that the Board with its Decision, is using as precedent, Decisions by Boards of Contract Appeals and by the U. S. Claims Court

(a) If all Boards of Contract Appeals process Appeals in same manner that Appellant's twenty three (23) Contracts on Appeal were processed by the HUDBCA and Decisions entered by the Board, this is including the Appeals that presently remain with the Board, that have been there since 1979 (almost 6 years), waiting for a Decision on Hearings held in November of 1982, to use these as an example, in the interest of justice, that shall not be delayed, a change in this Federal Court system, is clearly needed.

(b) Decisions by the U. S. Claims Court do not include a Trial by Jury, they are entered based on the opinion of a Federal Judge only.

Of all the Decisions used as precedent herewith, not one was entered in a U. S. District Court, which includes for the most, a Trial by Jury, whereby, Government Witnesses have second thoughts and will not as freely, commit perjury, with false testimony, in addition;

APPX. B-14, well supports that the Board did not have jurisdiction on some of Appellant's Claims presented.

There is no just cause for the CAFC to deprive Appellant of her Right to sue in the U. S. District Court, after Administrative relief was exhausted, by entering a Judgment on an issue clearly not before the Court to Affirm or Deny, issued as a Mandate, like an after-thought, way beyond the twenty one (21) days, as provided with Appellate Court Rules of Procedure.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

WALBER CONSTRUCTION COMPANY, Appellant, v. THE UNITED STATES, Appellee.	)	No. 84-641 79-421-C40

JUDGMENT

ON APPEAL from the Board of Contract Appeals - HUD

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED.

DATED: June 13, 1984

ENTERED BY ORDER OF THE COURT

George E. Hutchinson, Clerk

_____
Clerk

ISSUED AS A MANDATE: July 31, 1984

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

WALBER CONSTRUCTION CO., Appellant, v. THE UNITED STATES, Appellee.	)	Appeal No, 84-641

O R D E R

Having considered the motion of the appellant to vacate the mandate of this Court issued July 31, 1984;

IT IS ORDERED THAT:

The motion be, and the same is hereby denied.

FOR THE COURT

_____
Judge

Dated: October 4, 1984

Washington, D.C.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

717 Madison Place, N.W.
Washington, D.C. 20439

George E. Hutchinson
Clerk

Telephone: 633-6550
Area Code 202

October 4, 1984

Ms. Pauline Walber
D/B/A Walber Construction Company
3530 West Outer Drive
Detroit, Michigan 48221

RE: Walber Construction Company v. The U.S.
Appeal No. 84-641

Dear Ms. Walber:

The Court has today denied the motion of appellant for leave to file out of time a motion for reconsideration of the decision and opinion dated June 13, 1984 and the motion to vacate the mandate issued July 31, 1984.

FOR THE COURT

CLERK

cc: Mr. George M. Beasley, III
Mr. David M. Cohen

GEH:ejc

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

WALBER CONSTRUCTION CO., Appellant, V. THE UNITED STATES, Appellee.	Appeal No. 84-641
	RECEIVED Dec. 24, 1984 United States Court of Appeals for the Federal Circuit

NOTICE OF APPEAL

Notice is hereby given that Pauline Walber D/B/A Walber Construction Co., above named, hereby Appeals to the Supreme Court of the United States from the order Denying Appellant's Motion to Vacate Mandate and the Order Denying the Motion of Appellant for Leave to file out of time a Motion for Reconsideration of the Decision and Opinion entered by the Court.

Both Orders were entered in this action on the 4th day of October, 1984.

The Statute under which this Appeal is taken to the Supreme Court of the United States is 28 U.S.C 2106.

By: Pauline Walber D/B/A
Walber Construction Co.
Appellant,
3530 West Outer Drive
Detroit, Michigan 48221
Phone: 313-864-6076 or
313-537-7800

Dated: 12-20-84

APPENDIX G

RECEIVED
JAN 3 1985
OFFICE OF THE CLERK
SUPREME COURT, U.S.

WALBER CONSTRUCTION CO.

V.

U. S. COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Jurisdictional Statement

APPENDIX H

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

January 4, 1985

Ms. Pauline Walber
3520 W. Outer Drive
Detroit, MI 48221

RE: Walber Construction Company v. U. S.
Court of Appeals for the Federal Circuit

Dear Ms. Walber:

Your petition for a writ of certiorari has been returned under separate cover for its failure to comply with this Court's Rules governing either the size or format of either an appeal or a petition for a writ of certiorari.

I would direct your attention to the enclosed Rules as well as the sample petition for certiorari.

Very truly yours,

ALEXANDER L. STEVAS, CLERK

By:

Edward C. Schade
Assistant Clerk

cdd
Enc.

APPENDIX I

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

February 26, 1985

Mrs. Pauline Walber
WALBER CONSTRUCTION COMPANY
3530 West Outer Drive
Detroit, MI 48221

RE: Walber Construction Company v. The United States Court of Appeals for the Federal Circuit

Dear Mrs. Walber:

The jurisdictional statement which you have resubmitted is again being returned. The Court's Rules require that such pleadings be of a certain size. This includes the cover to those pleadings as well as the appendix thereto

Very truly yours,

ALEXANDER L. STEVAS, CLERK

By:

Edward C. Schade
Assistant Clerk

cdd
Enc.

APPENDIX J